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85-1862

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES E. GRAALMAN,

Petitioner,

v.

THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

With respect to the Civil Service Reform Act of 1978 and the regulations promulgated thereunder:

1. Did Congress intend, when it stated that "Actions based on unacceptable performance are governed by Chapter 43" to mean that actions based on unacceptable performance are governed by either Chapter 43 or Chapter 75, at the option of the Federal agency?

2. Whether 5 C.F.R. §1201.111(b) requires that the United States Court of Appeals for the Federal Circuit apply the came standard of review in evaluating the sufficiency of findings of fact made by the Merit Systems Protection Board as other circuit courts apply under 5 U. S. C. §557(c)(A) and (B) respecting findings of fact by administrative agencies?

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Federal Circuit and, as well, at the Merit Systems Protection Board, are contained in the caption of the case in this Court.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

James E. Graalman, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit in this case (Appendix A, infra.) is unreported; likewise, the decision of the Merit Systems Protection Board (Appendix B, infra.) is not officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on February 6, 1986. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Civil Service Reform Act of 1978, Public Law 95-454, 92 Stat. 1121, Chapters 23, 43 and 75.
2. 5 U.S.C. §557(c)(A) and (B).
3. 5 C.F.R., Part 430.
4. 5 C.F.R. Part 1200.

STATEMENT OF THE CASE

On August 3, 1982, the National Cancer Institute (NCI) proposed to reduce in rank the petitioner, James Graalman. At that time Mr. Graalman was a supervisory contract specialist, GM-15, in the Research Contracts Branch (RCB) of the NCI. By memorandum, dated December 17, 1982, NCI issued a final decision sustaining the reasons cited in the proposal and finding petitioner's reduction in rank was warranted. The reduction in rank, effective January 9, 1983, was to the position of a contract specialist, GS-13. This action was initited under the adverse action procedures authorized by 5 U.S.C., Chapter 75, for which the regulations are found at 5 C.F.R., Part 752. The Merit Systems Protection Board upheld the agency action. (Appendix B, infra.) In July of 1984, the petitioner appealed the M.S.P.B. presiding official's decision directly to the United States Court of

Appeals for the Federal Circuit. Shortly after the brief of the Department of Health and Human Services was filed in response to petitioner's brief, the Merit Systems Protection Board issued its decision in Gende v. The Department of Justice, 23 M.S.P.B. 604 (1984). In the Gende decision the Merit Systems Protection Board held hat once Chapter 43 appraisal systems were in place Chapter 75 adverse action proceedings were no longer proper to take any action predicated upon alleged unacceptable performance. The use of Chapter 75 was the primary issue already raised in your petitioner's brief before the Federal Circuit. On Tuesday, November 6, 1984, the case of Lovshin v. Department of the Navy, 767 F.2d 826 (Fed. Cir. 1985) came on for oral argument before a three judge panel of the Federal Circuit.

At the Lovshin argument, petitioner first became aware of the Gende decision. The Federal Circuit thus allowed supplemental briefs on the Chapter 43/Chapter 75 issue from counsel. At approximately that point in time, the instant case was stayed pending the resolution of the Lovshin decision.

On June 21, 1985, the Federal Circuit, en banc, and without further oral argument, issued its decision in Lovshin, in essence reversing the Merit Systems Protection Board's decision in Gende, and holding that both Chapter 75 and Chapter 43 are available to Federal agencies to take performance based actions against employees. In late 1985, the stay was removed for this case which shortly thereafter came on for oral argument before a three judge panel of the court, each of whom were with the majority in Lovshin. The court's decision

issued on Febrmary 6, 1986. On or about November 18, 1985, a petition for certiorari was filed by Mr. Lovshin (Number 85-882.) The Merit Systems Protection Board, for the first time in its history, filed a brief in support of the petition. On or about April 7, 1986, the petition for certiorari was denied. By order of this Court, Mr. Lovshin will file a petition for rehearing with this Court on or before May 27, 1986. This petition is, thus, offered not only for the benefit of Mr. Graalman, but also in support of the petition of Mr. Lovshin that this Court grant that petition for certiorari.

REASONS FOR GRANTING THE PETITION

1. A Priori Denial of Statutory Rights to Federal Employees.

The instant matter is a manifestation of the Lovshin decision which denies to

1.8 million Federal employees the following rights granted to them by the Congress:

a. the right to performance standards;

b. the right to job performance appraisals measured by those standards;

c. the right to have an opportunity to improve performance under the standards before any management action is taken; and

d. the right to have management's factual considerations in its performance decisionmaking limited to facts less than one year old.

Each of these rights were denied Mr. Graalman.

2. The Merit Systems Protection Board's Interpretation of CSRA was not granted substantial deference.

In its Lovshin decision, as applied in the instant matter, the Court of Appeals for the Federal Circuit goes to great lengths to justify its refusal to accept the interpretation of the Civil

Service Reform Act by the M.S.P.B. 767 F.2d at 836-840. In this rationale, that court fails to distinguish between obiter dicta and the holdings of the earlier cases upon which the court relies to find inconsistencies. It is axiomatic that the holding of any case is limited by and to the facts of the case. In each case cited by that court, there had yet to be established the performance appraisal system mandated by Congress to be in place in each agency by October 1981. At the time relavent to each of the cases cited, only Chapter 75 was available to management as the route by which to take any performance based action. Thus, no cited decision comes within the Rule of stare decisis [Humphrey's Executor v. United States, 295 U.S. 602 (1935)] and no cited case supports the inference that there has been "a path of... tortured vacillation

and indecision" by the M.S.P.B. [Secretary of the Interior v. California, 464 U.S. 312, 320 n.6 (1984)].

In fact the Federal Circuit fails to discuss systematically the regulations promulgated by the Office of Personnel Management, which fully supports the position taken by the M.S.P.B.

3. Federal Circuit Exception Is Illusionary.

In Lovshin, the Federal Circuit created an exception, to wit: "It would... be inconsistent with the merit principles... for an agency to bring an action for cause under Chapter 75 based solely on a performance that is governed by and meets the critical elements set forth for the employee's position." Yet, this is exactly what happened here. Mr. Graalman's performance appraisal established, less than six months earlier, that he met the critical elements of his position. As

the Federal Circuit, in its decision in Graalman, failed to address this issue, even though it was fully briefed, this tated exception is illusionary.

The Graalman decision was a rubber stamp of Lovshin. Rather than duplicate the arguments made in the Lovshin petition for certiorari, this petition will focus on the Office of Personnel Management (O.P.M.) regulations, which support fully petitioner's position and are in accord with Gende.

ARGUMENT

The entire Lovshin decision is predicated upon the difference the Federal Circuit found in the meaning Congress attributed to the concept "unacceptable performance" in contrast to any other concept mentioned in the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1121, or its legislative history, which describes less than adequate performance. This distinction finds no

support in the statute, its legislative history, or the regulations.

Under Chapter 75, prior to the adoption of the Civil Service Reform Act of 1978, the then Civil Service Commission, "to promote the efficiency of the service" was able to take any adverse action against Federal employees. Under that yardstick, the following types of behavior were included: Conflicts of interest, criminal convictions, criminal conduct, criticism of supervisors, criticism of fellow employees, disruptive conduct on the job, falsification of official forms or documents, failure to discharge personal obligations, insubordination, misuse of government property, pre-employment misconduct, ineffective supervision, inefficiency, refusal to work at the times or locations assigned, sexual misconduct, unauthorized absence, abuse of alcohol or drugs

and violation of conditions of employment. This list is not all inconclusive, but it provides a better understanding of why Chapter 75 was in its principal language left undisturbed by the Civil Service Reform Act of 1978, excepting to cut off the prior case law from use in Chapter 43 actions, i.e., before October of 1978, 5 U.S.C. §7513(a) covered all of these types of actions and with the exception of performance actions it was to continue to do so. But see Lovshin, at 835. Performance related activities constituted but a very small segment of the potential use of Chapter 75 as a basis for adverse actions, before October 1978. The "efficiency" concept had at least a sixty-five year history at the time the Civil Service Reform Act was made effective. See Lloyd - LaFolette Act, August 24, 1912, Ch. 389, 37 Stat. 555. It is, thus,

not surprising that the Congress specifically excluded the case law defining the "efficiency of the service concept" from §4303(a) actions relating to performance. Senate Rep. 43, 1978, U.S. Code Cong. and Ad. News, at 2765; Lovshin at 834. When that legislative history is read in conjunction with 5 U.S.C. §4301(3), the only logical conclusion possible is that new performance standards were to be established vis-a-vis the elements of an employee's position and performance was to be appraised, both critical and non-critical elements as the regulations now expressly require, by use of these standards.

In the Act, the nexus between "unacceptable performance" on the one[1/]

1/ 5 U.S.C. 4301(3) states: 'Unacceptable performance' means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

hand, and performance based actions, generally, on the other, is found explicitly in 5 U.S.C. 2301(b)(6).[2/] Congress did not overlook it. For to conclude, as did Lovshin, at 841, that the expression of merit principles found in §2301(b)(6) is "not stated in the narrowly defined language of Chapter 43" is for this court to overlook, wholly, the clear reference in §2301(b)(6) to "required standards." Standards applicable to performance are the only ones mentioned in the Act, are the only ones to which this reference could apply. The legislative history of the Act time and again supports the view that only

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2/ The Merit System Principles apply to the same agencies as does Chapter 43. Compare 5 U.S.C. §2301(a) and 5 U.S.C. §4301(a).

after an opportunity for improvement in performance is given to an employee, may a limited range of sanctions be invoked for performance deficiencies. That lesser sanctions (such as suspension) are not identified in the Act (Lovshin, at 834, 843) is completely consistent with each employee being given an opportunity to improve; suspension (which may make sense for non-performance adverse actions) is not appropriate, whereas demotion and removal are. And that is exactly what Congress said in the statute.

That each agency might become a law unto itself (Lovshin, at 843) is, within reason, in keeping with Congressional intent, as the agency would be able to meet its own unique needs (flexibility") under the general supervision of the Office of Personal Management and the Merit Systems Protection Board. (And see Lovshin,

at 832, 842.

The petitioner argues that he falls squarely within a performance based action that must be taken under Chapter 43 of Title 5 and is thereby excluded from Chapter 75 coverage, specifically by the Civil Service Reform Act of 1978, 5 C.F.R. §752.401(a)(1981), and 5 C.F.R. §430.203 (1981). These regulations were not discussed in Lovshin. Although the 1983 regulations are briefly mentioned, e.g., at 834, no analysis of either set of regulations was made by the court. The former regulation, adopted in 1980, reads as follows:

> Adverse actions covered. This subpart applies to an action set forth in subchapter II of Chapter 75 of Title 5, United States Code, including but not limited to:
>
> (1) An action based solely on non-performance related factors;
>
> (2) an action that involves both performance and non-performance related factors; and

> (3) A solely performance-based action which is taken by an agency that is not included within the definition of agency under subchapter I of Chapter 43 of Title 5, United States Code. [Emphasis supplied.]

Although there is the caveat "including but not limited to" in the introductory clause of this regulation, the clear language of this regulation, as well as that of 5 U.S.C. §7512(D), excludes from Chapter 75 adverse actions which are solely performance based. The regulation does so by limiting Chapter 75 actions to (i) non-performance actions, to (ii) non-performance allegations when combined with performance actions[3/] and (iii) agencies

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3/ The Lovshin court granted its imprimatur to "mixed" cases. 767 F.2 at 843. In that court's view, such would be an "unacceptable performance" charge combined with an "efficiency of the service" charge. This, of course, is expressly allowed by 5 C.F.R. §752.401(a)(2) to the extent the "efficiency" charge is non-performance based. The regulation undercuts the court's view to the extent a mixed case was seen by that court to include an "efficiency" charge based solely on performance.

where Chapter 43 does not apply, i.e., agencies not included within the definition of agency in 5 U.S.C. §4301. Any other interpretation of §752.401(a), must disregard the fact each of these lettered subparagraphs shows an intent to exclude performance actions, standing alone, from Chapter 75 coverage. In summary, this regulation is consistent with the statute and precludes a solely performance related action under Chapter 75 when the agency is an Executive Department under 5 U.S.C. §4301. The Department of Health and Human Services, the respondent, is such an Executive Department. This interpretation receives further support from 5 C.F.R., Part 430. In 5 C.F.R. §430.202(1981)[4/] the definition of the key

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4/ At the time the adverse action was initiated against Graalman, the 1981 regulations applied. The Lovshin decision, at 834, quotes from the 1983 regulations

[Footnote continued on following page.]

over, appraisals thus include both critical concepts are set forth. These definitions read as follows:

> (a) Appraisal system means a performance appraisal system established by an agency or component of an agency under subchapter I of chapter 43 of title 5, U.S.C. and Subpart B of this part which provides for establishment of performance standards, identification of critical elements, communication of standards, and critical elements to employees, establishment of methods and procedrues to appraise performance against established standards, and appropriate use of appraisal information in making personnel decisions.
>
> (b) "Performance" means an employee's accomplishment of assigned duties and responsibilities.
>
> (c) "Appraisal" means comparison of an employee's performance of duties and responsibilities with performance standards.

[Footnote 4 continued from preceding page.]

the parallel regulation to §430.202(e) (1981); there are significant differences in language between the 1981 and 1983 versions of these regulations. Both sets of regulations manifest, however, the same intent.

(d) "Performance standards" are the expressed measure of the level of achievement established by management for the duties and responsibilities of a position or group of positions. Performance standards may include, but are not limited to elements such as quantity, quality, and timeliness.

(e) "Critical element" means a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action and denial of a within-grade increase, and may be the basis for removing or reducing the grade level of that employee. Such action may be taken without regard to performance on other components of the job.

(f) "Appraisal period" means the period of time established by an appraisal system for which an employee's performance will be reviewed. [Emphasis supplied, throughout.]

Chapter 43 provides the only express statutory basis for performance appraisals of any sort. Key here, under these regulations, is that "performance" includes all duties, whether critical or not. Moreover, appraisals thus include both critical and non-critical elements to the extent performance standards have been established.

Two of Mr. Graalman's elements were not critical. (For non-critical elements to be appraised, under the 1983 regulations, they must, per 5 C.F.R. §430.203, (1984), be "of sufficient importance to warrant appraisal.") Without the establishment of standards, an agency would be operating on the ad hoc basis Congress forbids. Lovshin, at 832, quoting Senate Report at 4, 1978 U.S. Code Cong. & Ad. News at 2726. It is only without those required performance standards that a Chapter 75 action might be utilized as Gende, supra., discussed the case to be between October 1978 and October 1981. Inefficiency was a performance standard before 1978, but Congress and O.P.M. have decided that a "level of achievement" must be established, under Chapter 43, "by management" for all duties and responsibilities worthy of appraisal, whether critical or not.

The general inefficiency standard, unless specifically expressed as a measure of a level of achievement for an aspect of a given position, may no longer constitute a valid basis for a performance based adverse action. Thus, the whole of a position is to be appraised under Chapter 43, or rather under standards established under Chapter 43. This shows the error of Lovshin: All that would be left for consideration under Chapter 75 would be elements of a job not worthy of appraisal. If worthy of appraisal, Chapter 43 is the unique and sole mode of doing so. If such elements were not worthy of appraisal in the first instance, it is illogical to conclude that Congress intended that an employee might be fired or reduced in grade for performance problems with respect to the "unworthy" aspects of his job, i.e., he did not meet the "efficiency of the service" yardstick for aspects of his

decision. No other appraisal was provided position not worthy of being formally appraised. For these reasons, the 5 U.S.C. §7512(D) exclusion of actions under §4303 excludes all performance based actions from Chapter 75.

These conclusions find further support in other of the regulations. 5 C.F.R §430.203(1981) states, in pertinent part:

> (e) 5 U.S.C. 4302 requires that each appraisal system shall provide for periodic appraisals of performance. Employees shall generally be appraised on at least an annual basis. Agencies may provide for longer appraisal periods when duties and responsibilities of a position or the tour of duty of a position so warrant.
>
> (f) Critical elements and [all] performance standards shall be in writing.
>
> (g) Periodic appraisals shall be in writing and shall be provided to the employee.
>
> * * *
>
> (i) Performance appraisals shall be used:
>
> (1) To provide employees with information on their performance and how it may be improved.

> (2) As a basis for decisions to grant awards; grant or withhold pay increases, i.e., within-grade increases, step increases, and quality step increases, grant merit pay; reassing; promote; train; retain in reduction in force; reduce in grade or remove. [Emphasis supplied, throughout.]

These 1981 regulations demand, then, that performance appraisals must ("shall") be used in decisions to "reduce in grade." Yet, it would be impossible herein to rely upon the agency's performance appraisal of Mr. Graalman, because Mr. Graalman met or exceeded each critical element of his 1981 performance appraisal. Moreover, he had shown marked improvement in his performance for the appraisal period endind in September 1981, achieving a "fully successful" rating. The M.S.P.B. presiding official never even mentioned this appraisal in his decision; nor did the Federal Circuit. No other appraisal was provided Mr. Graalman, in writing [§430.203(a)],

unless one includes the notice of proposed adverse action eleven months later -- five months after he was detailed from his position. There were no progress reviews for 1981-1982 on Mr. Graalman's performance. In 1983 the above regulations were amended and "performance" now specifically includes critical and non-critical elements, which was the intent of the 1980 regulations. 5 C.F.R. §430.203 (1984). This interpretation by O.P.M. blurs the very distinction upon which this court hinged its Lovshin decision, to wit: "Unacceptable performance" is not a snynonym for generally poor performance. Lovshin, at 834. How is this distinction blurred? It is blurred by requiring performance standards for all worthy aspects of a position, whereas, "unacceptable performance" requires only standards for critical elements. By bringing all performance under prescribed standards, O.P.M. confirmed the mutual exclusivity of

performance actions from Chapter 75 actions. Any action predicated solely upon performance must be processed under Chapter 43, and Chapter 43 alone. Chapter 75 has no performance standards. What Congress and O.P.M. are and were trying to do was to force each agency to determine those assigned tasks which are critical to the organization and those which are not critical. The former, the critical aspects, provide the bases for required action when performance is sub-standard; the latter provide the predicate for permissive action when performance is sub-standard. In either case standards are required. The "inefficiency" concept is not a permissible standard; it is not "the right reason." Senate Report at 4, 1978 U.S. Cong. & Ad. News at 2762. Congress cut off the prior case law interpreting the "efficiency" yardstick from any application to a Chapter 43 action. Id. at

2765. 5 U.S.C. §2301(a)(6) speaks of "standards" not one standard. "Unacceptable performance" actions must be brought under Chapter 43. Any required action must, however, be designed to address the critical elements of an individual's position, the critical elements which have been established through an inter-active process between an employee and his management. 5 C.F.R. §430.203(b)(1981). Permissive actions still must be predicated upon standards established for non-critical elements under Chapter 43. Each of the charges brought against the petitioner falls within one or more of the critical elements of Graalman's performance "appraisal plan." It must also be emphasized that with respect to each of the critical elements, in September 1981, Mr. Graalman either met or exceeded the prescribed performance standard according to his performance appraisal.

The result now faced herein is not only precluded by the above discussed regulations from being processed under Chapter 75, but it also falls squarely within the limiting *dicta* of *Lovshin*, which state:[5/]

> * * * It would, for example, be inconsistent with the merit principles set out in §2301(a)(6) and (7) for an agency to bring an action for cause under Chapter 75 based solely on a performance that is governed by and meets the critical elements set forth for the employee's position. An agency may not circumvent

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5/ At a minimum, these *dicta* require a finding by the agency and the M.S.P.B. presiding official that the charges do *not* relate to critical elements upon which a "fully successful" rating or better was achieved. This is an impossible finding in this case. Further, as "unacceptable performance" always requires some action by management, it is the outer limit of the new statutory scheme. Other concepts formerly considered agregious, are now precluded as to critical and non-critical elements for which standards have been established. Two such concepts were referenced by the M.S.P.B. presiding offical: "mismanagement" and "negligence." (App. B, p. 6.)

> Chapter 43 by charging that an employee should have performed better than the standards communicated to him in accordance with Chapter 43. [767 F.2d at 843.]

What in Lovshin is said not to be able to occur is exactly what has happened here, and without an opportunity to cure (improve) having been given. In September of 1981, Mr. Graalman was told he exceeded, or at least met, the performance standard for each element of his performance appraisal plan, whether critical or not (two elements were not); that is to say that he was performing to the standards communicated to him in accordance with Chapter 43, as "fully successful;" his overall rating was "3." See 5 C.F.R. §430.204(h)(1984). Yet less than six months later, the agency informally not in writing and not as a part of a performance appraisal) told him that his performance required that he be detailed

out of his position (March 1, 1982). The detail from his then position as Chief of the Research Contracts Branch was purportedly for an investigation -- an investigation of his performance. What it was then was a denial of an opportunity to improve. The denial of his statutory right.

In sum, after October of 1981, no performance action may be taken by any agneyc without an established standard relating to a position. The majority opinion in Lovshin grafts the "efficiency of the service" standard onto Chapter 43. There is no statutory basis upon which to do this. For the reasons stated in petitioner's brief, in the two dissenting opinions filed in Lovshin, at 846 and 852, and for the reasons stated above, Lovshin is error. Putting that error aside, petitioner in this case falls within the Lovshin exception: The action to remove Mr. Graalman as Chief required

that he be found to be sub-standard at a level not incorporated within his performance appraisal plan, and not communicated to him in writing, either in his September 1981 evaluation or any later appraisal or progress review.

The second issue is the establishment of the proper standard of review for the Federal Circuit of findings of fact by the M.S.P.B.

In Graalman, the presiding official's decision, in contravention of the regulation, contained no meaningful findings of fact.

Part 1200 of 5 C.F.R. contains the following mandate:

> (b) Each initial decision shall contain:
>
> (1) Findings of fact and conclusions, as well as the reasons or bases therefor, upon all the material issues of fact and law presented on the record;
>
> (2) An order as to the final disposition of the case, including appropriate relief; [5 C.F.R. §§1201.111(b)(i) and (2).]

The language of §§1201.111(b)(1) and (2) is nearly identical to the language found in the Administrative Procedure Act (A.P.A.), 5 U.S.C. §557(c)(A) and (B), which mandate that:

> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of:
>
> (A) Findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) The appropriate rule, order, sanction, relief, or denial thereof.

Both these requirements for findings of fact were embodiments of earlier case law. See, generally, 146 A.L.R. 202. This requirement has a constitutional dimension, in that the failure to set forth findings of fact denies to a party the right to meaningful appellate

review, thereby denying to him due process of law. This is especially the case, as here, where appellate review of M.S.P.B. decisions is not de novo, but only to answer the question "whether there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gellerman v. Nimmo, 704 F.2d 1004 (7th Cir. 1983).

It is well settled that "findings of fact are not mere procedural niceties; they are essential to the effective review of administrative decisions." USV Pharmaceutical Corp. v. Secretary of HEW, 466 F.2d 455 (D.C. Cir. 1972); see also, National Geographic Society v. District Unemployment Compensation Board, 438 F.2d 154 (D.C. Cir. 1970). In addition,

> . . . a court cannot determine whether an agency has acted correctly unless . . . [the court is] . . . told what factors are important and why they are relevant. Therefore, an agency must provide a

> reasoned explanation for its actions and articulate with some clarity the standards that govern its decision.

Moon v. United States Department of Labor, 727 F.2d 1315 (D.C. Cir. 1984). Moreover, §1201.111(b) of 5 C.F.R. provides that each initial decision shall contain, ". . . findings of fact and conclusions, as well as the reasons and bases therefor upon all the material issues of fact and law presented on the record ...." [Emphasis supplied.] As stated above, this language is nearly identical to that found in §557(c) of the Administrative Procedure Act, which has been found to be a required crucial step in the administrative review process. Director, Office of Workers' Compensation Programs, United States Department of Labor v. Congleton, 743 F.2d 428 (6th Cir. 1984). As the Congleton court pointed out, "[t]he courts have respected this requirement by

remanding cases where the reasoning for the a.l.j.'s conclusion is lacking and therefore presents inadequate information to accommodate a thorough review." Id. at 429.

In Congleton, the government had appealed from an award of black lung benefits to a miner's widow. The a.l.j. in that case had credited the testimony of the widow, her daughter, and nine affidavits of former co-workers and friends in support of his finding that the deceased had had twenty-five years of caol mine employment. On review, the court found that the a.l.j. had both failed to provide his rationale for crediting this evidence, and had ignored other conflicting testimony. 743 F.2d at 429. With respect to the sufficiency of the evidence presented, the Congleton court stated:

> ... we remain steadfast in our conviction that an a.l.j.'s conclusory opinion which does not encompass a discussion of evidence contrary to his findings, does not warrant affirmance. For even in applying the deferential standard of "substantial evidence," the review court must take into account the evidence of record that detracts from as well as supports the challenged findings of fact.

Id. at 430; emphasis supplied.

In the case at bar, the presiding official's findings ignore significant evidence presented by Mr. Graalman. With respect to his finding that Mr. Graalman mismanaged the Tracor-Jitco contract, the presiding official credited Mr. Fretts' testimony in support of his conclusion that Mr. Graalman had not exercised proper judgment in appointing Ms. Britton as the contracting officer. The presiding official failed to mention, however, the

evidence which established that Ms. Britton was hired in accordance with the Merit System principles in a competitive selection. Additionally, the presiding official never mentioned Mr. Graalman's overall "fully successful" appraisal rating or the specific element of that appraisal entitled "selection and utilization of personnel," for which he received an "exceeded performance standard" rating. As stated above, the presiding official credited Mr. Fretts' testimony with respect to his advice regarding the hiring of Ms. Britton; however, without explanation he failed to credit any other aspect of Mr. Fretts' testimony.

With regard to other charges against Mr. Graalman, the presiding official makes one, single conclusory finding of mismanagement wherein he lumps

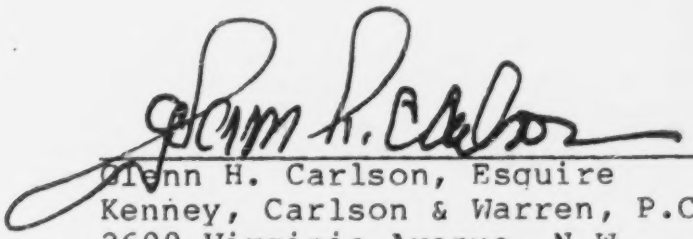
the remaining charges of deficiency together. Similarly, he lumps together Mr. Graalman's specific responses to these charges and refers to the result as "[a]ppellant's typical response." Indeed, the presiding official admits that "when viewed singly appellants' excuses appear to have some merit;" yet he fails to provide any reason for ignoring this "merit." (App. B. p. 6.) The only proper manner in which to evaluate these charges, and the evidence of record, is on the individual basis by which they were instituted and decided by the agency -- as separate charges; and as such, each charge constitutes an issue of material fact upon which findings are required. 5 C.F.R. §1201.111(b)(1)(1981); and see 5 U.S.C. §7513(b)(1) ("specific reasons for the proposed action") and 5 C.F.R. §752.404 (f)(1981) ("reasons specified in the

notice".) Under Chapter 43 such generalizations may be acceptable, for there is not the same statutory requirement of "specific reasons." If Chapter 75 is a permissible basis for a performance action, such general findings cannot be allowed to stand.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: May 7, 1986

APPENDIX A

THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES E. GRAALMAN,

Petitioner,

v. Appeal No. 84-1233

THE DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Respondent.

DECIDED: February 6, 1986

Before RICH, DAVIS and NIES,
Circuit Judges.

NIES, Circuit Judge

DECISION

James E. Graalman seeks review of the Merit Systems Protection Board's final decision, Case No. DC07528310349, affirming his demotion from the position of Supervisory Contract Specialist, GM-15, to the position of Contract Specialist, GS-13, [sic] for negligence in

management of the Research Contracts Branch, National Cancer Institute.

We affirm.

DISCUSSION

As a threshold matter, this panel has neither the authority, see South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982), nor the inclination to overrule Lovshin v. Department of the Navy, 767 F.2d 826 (Fed. Cir. 1986). Nor are we persuaded by Graalman's alternative argument for the proposition that his case should have been treated under Chapter 43, that his demotion was "based solely on performance that is governed by and meets the critical elements for the employee's position." Lovshin, 767 F.2d at 842. Graalman relies on performance appraisals pre-dating the discovery of his failure to monitor the Tracor-Jitco contract, which the presiding official found to be "mismanagement and/or negligence."

The earlier performance appraisals are irrelevant to the agency action of which Graalman here complains. Graalman's case was properly treated as a Chapter 75 removal case.

The presiding official's finding that the deciding official was not predisposed to remove Graalman is supported by substantial evidence. The deciding official's satement relied on by Graalman as a smoking gun, one expressing an intent to "remove" Graalman, concerned detailing Graalman to another position during an investigation and not to Graalman's eventual demotion. Graalman's contrary assumption is the crux of his argument that the deciding official was biased. Accordingly, we are not persuaded of any infirmity in the agency decision-making process due to bias of the deciding official.

With respect to his argument that he was treated disparately from the contracting officer and her supervisor, Graalman alleges that the presiding official failed to make adequate findings of fact. However, the presiding official's finding that the fact situations of Graalman and his subordinates are "far from comparable" is supported by substantial evidence. Assuming that a desparate treatment argument is tenable as a matter of law, Douglas v. Veterans Administration, 5 MSPR 280, 305 (1981), contra Schapansky v. Department of Transportation, 735 F.2d 477, 485 (Fed. Cir. 1984) ("Unevenness in application of a penalty is not a ground for invalidating it"), the fact that Graalman and his subordinates awere not similarly situated renders his argument untenable as a matter of fact. See Schapansky at 485.

In sum, we do not not find that the presiding official's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or that it was obtained without procedures required by law, rule or regulation having been followed. 5 U.S.C. § 7703(c) (1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JAMES E. GRAALMAN	)	
	)	CASE NUMBER
v.	)	DC07528310349
	)	
DEPARTMENT OF HEALTH AND HUMAN SERVICES	)	DATE January 31, 1984
	)	

INTRODUCTION

Appellant filed an appeal from the agency's action demoting him from the position of Supervisory contract Specialist, GS-13, effective January 9, 1983. The record reflects that appellant is a covered employee as contemplated by applicable statutory and regulatory provisions, and that the appeal is properly before the Board for adjudication. See 5 U.S.C. §§7511(a)(1)(A), 7512, 7513(d); 5 C.F.R. §§752.401(a), 752.401 (b)(1), 752.405(a).

ANALYSIS AND FINDINGS

By memorandum dated August 3, 1982, the agency proposed appellant's demotion based upon his alleged negligence in the

management of the Research Contracts Branch, National Cancer Institute (NCI). Appellant submitted a detailed written response to the proposal notice on September 3, 1982. By memorandum dated December 17, 1982, Dr. Vincent T. DeVita, Jr., Director of NIC issued a final decision sustaining the reaons cited in the proposal notice, and finding that appellant's demotion was warranted. The first area of alleged negligence on appellant's part concerned the inadequacy of the monitoring of a major contract (Tracor-Jitco). In December of 1981, the contract officer responsible for said contract discovered that numerous change orders had not been approved on the contract, and that there was a potential for cost overruns. The proposing official, Philip D. Amoruso, Associate Director for Administrative Management, testified that when his

Deputy, Robert Namovicz, asked appellant aobut this situation in December of 1981, appellant indicated there was no need to worry. However, it was subsequently determiend that 471 change orders over a period of years were involved, and that potential unauthorized cost increases totalling $11.5 million existed on the contract. Responsibility for oversight of the contract was withdrawn from the RCB and transferred to the National Institute of Environmental Health Sciences (NIEHS). This transfer was recommended by Carl Fretts, Director, ivision of Contract and Grants (DCG). Appellant contends that he should not be held responsible for the problems with the Tracor-Jitco contract because they were caused by naivete and ignorance on the part of the contract officer, and inadequate surveillance by her section chief. However, the record

reflects that this particular contract had been previously identified as a serious problem, and appellant had received specific recommendations and instructions regarding the monitoring of the contract so as to prevent problems such as those which surfaced in December of 1981. In fact, Mr. Fretts testified that he had specifically advised appellant not to assign the contract to this particular contract officer because he did not feel that she was experienced enough to handle it. Given the multitude and specificity of recommendations and instructions regarding the sensitivity of this contract, I find that appellant cannot escape culpability for the serious problems which arose. Even after the problems were initially brought to appellant's attention in December of 1981, appellant was unaware of the

scope of the problems and/or failed to deal with them until February of 1982, when the contract was removed from RCB's area of responsibility. I find that appellant's failure with respect to the monitoring of the Tracor-Jitco contract did constitute mismanagement and/or negligence on his part. Miller v. Department of Health and Human Services, 7 MSPB 713 (1981).

In March of 1982, appellant was detailed out of his position as Chief of the RCB. Mr. Namovicz was temporarily assigned to run the RCB. Messrs. Namovicz and Amoruso testified in great detail and at great length regarding the deficiencies which Mr. Namovicz discovered during his tenure in the Branch. With few exceptions, the deficiencies involved areas in which appellant had previously received specific criticisms or instructions regarding identified problems, or

recommendations for improvement of the management of the Branch. Appellant's typical response to these other instances of mismanagement cited in the proposal notice was that he was aware of the instruction or recommendation, and intended to take some sort of action, but that more study or more time was needed to effect implementation. When viewed singly, appellant's excuses appear to have a certain degree of merit. However, I find, as did the agency, that appellant's litany of explanations cannot serve to "excuse" his failure to correct deficiencies and effect improvements in the areas of administrative oversight and processing and personnel management. I find that appellant was negligent in his management of the Research Contracts Branch, and that the agency's charges as set forth in the proposal notice are supported

by a preponderance of the evidence, and are hereby sustained. 5 U.S.C. §7513. Appellant contended that the agency's action as "politically" motivated, and therefore improper. However, he did not allege that the action was due to any partisan political affiliation. Rather, he alleged that agency officials were concerned about possible criticism of the agency by a United States Senate oversight committee as a result of problems in the Research Contracts Branch. Assuming that the agency did have such a concern, I find nothing improper in the agency's consideration thereof in taking an adverse action, assuming that said action is otherwise warranted to promote the efficiency of the service. In light of my findings below, the agency's additional consideration of its public image, assuming that such is the case, would have hardly

been improper. I therefore find appellant's argument to be without merit. Apellant raised several instances of alleged procedural error by the agency. In this regard, he must show error by the agency in the application of its procedures, and that, in the absence or cure of the error, the agency might have reached a different conclusion. 5 U.S.C. §7701(c)(2)(A); 5 C.F.R. §§1201.56(b)(1), 1201.56(c)(3); Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). Appellant's first allegation is that the agency's action should have been processed under the provisions of 5 C.F.R. Part 432 dealing with actions based upon unacceptable performance. However, as I have found above, the sustained charges went beyond the realm of unacceptable performance, and constituted mismanagement and/or negligence more appropriately addressed under 5 C.F.R. Part 752.

Rassmussen v. United States Postal Service, 7 MSPB 149 (1981). Moreover, by taking the action under Part 752, the agency was required to satisfy a higher burden of proof. Appellant has failed to show error by the agency in this regard, and I find his allegation to be without merit.

Appellant also alleged that he was denied the opportunity for a meaningful reply because Dr. DeVita had previously expressed a belief that appellant was culpable for the problems in the Research Contracts Branch. However, the Board has held that there is no general proscription against the appointment as a deciding official of a person who has expresed a predisposition contrary to an appellant's interests. Littlefield v. Department of the Air Force, MSPB Docket No. DC07528110299 (June 29, 1982). Moreover, Appellant's allegation is based primarily upon Mr. Frett's

testimony that at a meeting some months prior to the issuance of the proposal notice, Dr. DeVita had indicated that he wished to remove the appellant. However, no such action was ever proposed, or effected. In addition, Dr. DeVita testified that the intention to "remove" appellant dealt solely with his removal from supervision of the Branch, which was accomplished by the detail in March of 1982. Dr. DeVita denied any predisposition regarding adverse action, per se, and the evidence fails to establish any improper considerations in this regard. I therefore find no error, as lleged.

Appellant's next contention was that Dr. DeVita considered matters in reaching his decision to which appellant had no opportunity to respond. In this regard, appellant refers to Dr. DeVita's testimony that he had once received incorrect

advice from appellant on an important matter, and personally and little confidence in appellant. As previously noted, a deciding official need not, and often cannot operate in a vacuum, particularly where he is familiar with a fact sitaution or a particular appellant. Littlefield, supra. Moreover, in light of the sustained charges, there is no indication of that Dr. DeVita's decision would have been any different even absent his personal opinion of appellant's capabilities. I therefore find no harmful error, as alleged.

Finally, appellant argued that he was subjected to disparate treatment in that the agency took no action against the contracting officer or her section chief with respect to the Tracor-Jitco situation. However, the Tracor-Jitco problem was one of many charges of mismanagement

and/or negligence on appellant's part. The fact situations are therefore far from comparable, and the issue of possible corrective action with respect to appellant's subordinates, an area within appellant's own responsibilities until March of 1982, is irrelevant to the question of alleged disparate treatment of appellant in this case. I therefore find no merit in appellant's argument. As to the penalty imposed by the agency, the Board's function in this regard is to assure that the agency considered relevant factors in reaching its determination, and that the penalty is within tolerable limits of reasonableness. Douglas v. Veterans Administration, 5 MSPB 313 (1981). As noted in the decision, appellant is considered to be an expert in the technical aspects of research contracting, and has no prior disciplinary record or performance

problems. In similar cases where the agency's acharges have dealt primarily with problems in supervision and management, the Board has held that demotion to a nonsupervisory position with the least reduction in grade possible, constitutes a reasonable penalty. Miller, supra; Rassmussen, supra. Appellant has not alleged, nor does the record reflect, that there are any nonsupervisory positions above the GS-13 level to which appellant could have been assigned. I therefore find that the agency's penalty selection was both reasonable and appropriate.

DECISION

The action effecting appellant's demotion is hereby AFFIRMED.

NOTICE

This is an initial decision and will become a final decision of the Merit Systems Protection Board on March 6,

1984 unless a petition for review is filed with the Board.

Any petition for review must be filed with the Board within thirty-five (35) calendar days after the issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management (OPM) and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review only if he or she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule or regulation under the jurisdiction of OPM. 5 U.S.C. §7701(e)(2). The petition must specifically identify the exception taken to this decision, cite the basis for exception, and refer to applicable law, rule or regulation. The petition for review must be filed

with the Office of the Secretary, Merit Systems Protection Board, Washington, D.C. 20419, no later than thirty-five (35) calendar days after issuance of this decision. If a petition for review is filed, an informational copy of it should be forwarded to this office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Any appellant adversely affected or aggrieved by the Board's final decision may obtain judicial review by filing a petition with the United States Court of Appeals for

the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days of the final Board decision. 5 U.S.C. §7703(b)(1).

For the Board:

/s/ Joseph E. Clancy
Joseph E. Clancy
Presiding Official

(2)

No. 85-1862

Supreme Court, U.S.
FILED
JUL 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES E. GRAALMAN, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
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Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1862

JAMES E. GRAALMAN, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that his demotion from GM-15 to GS-13 was improper because an incorrect demotion procedure was used.

1. Petitioner managed the Research Contracts Branch of the National Cancer Institute. The agency charged that petitioner had been deficient in managing the Branch in a host of ways. Among the many instances of mismanagement on petitioner's part, the agency charged that he had inadequately monitored a major contract, the Tracor-Jitco contract, resulting in "potential unauthorized cost increases totalling $11.5 million." Pet. App. B1-B2, B3. Petitioner was demoted from the position of Supervisory Contract Specialist, GM-15, to the position of Contract Specialist, GS-13. Petitioner appealed his demotion to the Merit Systems Protection Board (MSPB).

The MSPB's presiding official concluded that petitioner's "failure with respect to the monitoring of the Tracor-Jitco contract did constitute mismanagement and/or negligence on his part" (Pet. App. B5). With respect to the many other instances of mismanagement, the presiding official found that petitioner's "litany of explanations [was insufficient] to 'excuse' his failure to correct [his] deficiencies" (*id.* at B6). Accordingly, the presiding official held that the charges against petitioner were supported by a preponderance of the evidence and that petitioner's demotion was warranted to promote the efficiency of service (*id.* at B6-B7).

The presiding official also rejected petitioner's allegation that, because he had been charged with performance-related failures, the agency's action should have been taken under the procedures established in 5 C.F.R. Pt. 432, which implements Chapter 43 of Title 5 (5 U.S.C. 4301 *et seq.*), rather than under the procedures prescribed by 5 C.F.R. Pt. 752, which implements Chapter 75 of Title 5 (5 U.S.C. 7501 *et seq.*). Part 432 sets out the procedures for adverse actions under the performance appraisal system that was developed pursuant to the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* Under that new system, employees may be demoted for "unacceptable performance" of a "critical element" of the employee's position. 5 U.S.C. 4303. The MSPB reviews adverse actions taken pursuant to this system under the substantial evidence standard (5 U.S.C. 7701(c)(1)(A)). Part 752, which was left largely unchanged by the CSRA, authorizes remedial actions against employees for a variety of reasons, including generalized poor performance that does not fit within the confines of a critical element of an employee's job. A demotion under Part 752 is warranted only where it "will promote the efficiency of the service" (5 U.S.C. 7513(a))—a showing that the agency does not have to make

under Part 432—and the MSPB reviews actions taken pursuant to Part 752 under the preponderance of the evidence standard (5 U.S.C. 7701(c)(1)(B)) rather than the lesser substantial evidence standard. The presiding official found that "the sustained charges went beyond the realm of unacceptable performance [on a critical element of petitioner's position], and constituted mismanagement and/or negligence more appropriately addressed under 5 C.F.R. Part 752" (Pet. App. B8).

The court of appeals affirmed (Pet. App. A1-A5). After the presiding official issued his opinion, the court held in *Lovshin* v. *Department of the Navy*, 767 F.2d 826, 843 (Fed. Cir. 1985) (en banc), cert. denied, No. 85-882 (Apr. 7, 1986), that agencies may pursue performance-based adverse actions under Chapter 75 as well as under Chapter 43. The panel in this case noted that it had "neither the authority * * * nor the inclination to overrule *Lovshin*" (Pet. App. A2). It also rejected petitioner's argument that his demotion was "based solely on performance that is governed by and meets the critical elements set forth for the employee's position" (*Lovshin*, 767 F.2d at 842), so that the action had to be brought under Chapter 43; the court agreed with the presiding official that petitioner's actions constituted " 'mismanagment and/or negligence' " so that his "case was properly treated as a Chapter 75 removal case" (Pet. App. A2-A3). The court also rejected petitioner's argument that the presiding official failed to make adequate findings of fact (*id.* at A4).

2. Petitioner's primary argument (Pet. 10-31) is that the Federal Circuit erred in holding in *Lovshin* that an agency may bring a performance-based action under Chapter 75 as well as under Chapter 43. Petitioner is wrong, for the reasons set forth in our opposition to the petition for a writ of

certiorari in that case.[1] This Court recently denied the petition for a writ of certiorari in *Lovshin*.[2] There is no difference between this case and *Lovshin* that makes review by this Court warranted here.[3]

Petitioner also contends (Pet. 31-39) that the court of appeals erred in rejecting his argument that the presiding official's opinion contained insufficient findings of fact. Petitioner suggests (Pet. 36-37) that the presiding official

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[1]We have sent a copy of our opposition in *Lovshin* to counsel for petitioner. In sum, as we explained in our opposition, Congress enacted the CSRA "as a relief measure for agencies" desiring to remove or demote incompetent employees (*Wells* v. *Harris*, 1 M.S.P.R. 208, 249 (1979)). An agency may remove or demote such an employee under the streamlined procedures of Chapter 43 where the employee's performance of a critical element of his job is unacceptable. But when, as here, an incompetent employee's poor performance is not reflected in unacceptable ratings on the critical elements of his job in evaluations under the performance appraisal system developed to implement the CSRA, an agency may still remove or demote such an employee. In such a case, the agency must proceed under Chapter 75 and show by a preponderance of the evidence that the adverse action promoted the efficiency of the service.

[2]Petitioner notes (Pet. 6) that a petition for rehearing was filed in *Lovshin*. Rehearing was denied on June 16, 1986 (No. 85-882).

[3]Petitioner suggests (Pet. 9) that his case falls into an exception suggested by the court in *Lovshin* because he was demoted for "performance that is governed by and meets the critical elements set forth for the employee's position" (767 F.2d at 842). He states that the court of appeals "failed to address this issue, even though it was fully briefed" (Pet. 10). Petitioner errs in both respects. The court of appeals addressed this issue (Pet. App. A2-A3), correctly concluding that the performance appraisals on which petitioner relies in making the assertion that his performance was satisfactory do not support that assertion. As the court concluded, the performance appraisals petitioner cites are irrelevant because they did not cover his negligent monitoring of the Tracor-Jitco project and many of the other instances of mismanagement by petitioner on which the agency based his demotion. In any event, whether a panel of the Federal Circuit erred in applying an exception to a rule suggested by that court en banc is not an issue warranting review by this Court.

should have mentioned that petitioner did not hire the contracting officer assigned to the Tracor-Jitco project. He also suggests (Pet. 38) that the presiding official should have discussed the other charges of mismanagement and his excuses in detail. These contentions are without merit. While the presiding official was required to make findings of fact, there is no requirement that he recite every piece of evidence he considered. Moreover, whether the presiding official in this case adequately explained his findings of fact, as the court of appeals concluded, is obviously a fact-bound question that does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of ceriorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1986